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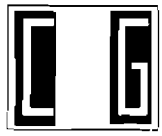

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April 9, 2009

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 – 12th Street, S.W.
Washington, D.C. 20554

Re: OLS, Inc. and TeleUno, Inc.
Petition for Expedited Declaratory Ruling Regarding Application of Sections 201(b) and 203(c) to Underlying Carrier's Practices and Charges

Dear Secretary Dortch:

Transmitted herewith, on behalf of OLS, Inc. and TeleUno, Inc., is a Petition for Expedited Declaratory Ruling that Global Crossing Bandwidth, Inc.'s Practices and Charges identified therein constitute Unreasonable Practices in Violation of Sections 201(b) and 203(c) of the Communications Act. An original plus nine (9) copies of the Petition are enclosed.

An addition copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided. To the extent you have any questions concerning this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,

Charles H. Helein /sa

Charles H. Helein
Counsel for OLS, Inc. and TeleUno, Inc.

Enclosures
cc: Service List parties

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
Petition for Expedited Declaratory Ruling Regarding Application of Sections 201(b) And 203(c) To Underlying Carrier's Practices and Charges	)

OLS, INC.'S AND TELEUNO INC'S PETITION FOR EXPEDITED DECLARATORY RULING THAT GLOBAL CROSSING BANDWIDTH, INC.'S PRACTICES AND CHARGES ARE UNREASONABLE PRACTICES IN VIOLATION OF SECTIONS 201(b) AND 203(c) OF THE COMMUNICATIONS ACT

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Catherine M. Hannan
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April 9, 2009

Attorneys for OLS, Inc. and TeleUno, Inc.

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EXECUTIVE SUMMARY

Pursuant to Sections 4(i) and (j) of the Federal Communications Act, 47 USC §§ 4(i) and 4 (j), as amended (1996), ("FCA"), Commission Rule 1.2, 47 C.F.R. §1.2 and the Administrative Procedure Act, 5 U.S.C. § 554(e), OLS, Inc. and TeleUno, Inc., ("Petitioners"), hereby petition the Commission for an expedited declaratory ruling on a number of issues, more fully set forth following, which confront numerous telecommunications carriers every day in their dealings with underlying carrier suppliers. Each of these issues represents a situation of unreasonable abuse of power by such underlying carriers in violation of Sections 201(b) and 203(c) of the Communications Act of 1934, as amended.

Petitioners are required to file this Petition for Expedited Declaratory Ruling to compel action by the Federal Communications Commission, as required by the Administrative Procedures Act, 5 U.S.C. §555(b), that "within a reasonable time, each [federal] agency shall proceed to conclude a matter presented to it." More than six months ago, on September 19, 2008, Petitioners filed a Petition for Declaratory Ruling seeking resolution by the FCC of the issues identified above. Since that time, Petitioners have made numerous inquiries as to the likely date that Petition would be put out for Public Notice. In contravention of the FCC's Congressional mandate that the FCC should "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice," the Petition has not been released for Public Notice. On the contrary, a deliberate order was made that the Petition not be placed on public notice. Petitioners discovered this only after investigating why no action had been taken. The Petition filed on the September 19, 2008 continues to be ignored as are the Petitioners' legal and constitutional rights and the Commission's statutory obligations. Left without recourse on their original Petition, Petitioners have little choice but to resubmit their Petition and present additional facts since the original filing that underscore the public necessity for proper Commission treatment.

The issues raised in the instant Petition are matters of widespread concern involving industry practices that on the particular facts as shown conflict with the fundamental tenents of Title II statutory provisions and court (including the United States Supreme Court) decisions interpreting those provisions as well as Commission decisions and policies. Because of the Commission's inaction, not only do these issue remain unresolved, there resolution being delayed will likely create a conflict between the holdings of the Commission and a court.

Resolution is also necessary not only to limit (and perhaps reverse) the harm experienced by Petitioners during the six month period of inaction on their original Petition but also to ensure that the practices complained of are duly examined by the agency entrusted by Congress to decide the issues raised by such practices. Importantly, action is required so that the Commission can rectify its unexplained failure to properly respond to a valid petition for declaratory ruling as required by the Administrative Procedure Act and its own rules. Petitioners respectfully request that arbitrary and capricious abuse of discretion that has led to the denial of Petitioners' legal and constitutional rights be promptly cured by placing this Petition on public notice for public consideration and comment and then to issue the declaratory rulings sought on an expedited basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
OLS, Inc. and TeleUno, Inc.	)	
	)	File No.
Petition for Expedited Declaratory Ruling Regarding Application of Sections 201(b) and 203(c) To Carrier Practices and Charges	)	

PETITION FOR EXPEDITED DECLARATORY RULING

Pursuant to Sections 4(i) and (j) of the Federal Communications Act, 47 USC §§ 4(i) and 4 (j), as amended (1996), ("FCA"), Commission Rule 1.2, 47 C.F.R. §1.2 and the Administrative Procedure Act, 5 U.S.C. § 554(e), OLS, Inc. and TeleUno, Inc., ("Petitioners"), hereby petition the Commission for an expedited declaratory ruling that:

(1) An underlying carrier's practices, including demands for payments of disputed amounts unilaterally rejected without basis and in violation of expressly agreed to dispute procedures, repeated use of threats to disconnect its services unless invalid charges are paid, promising forgiveness of the invalid charges for agreement to enter into additional term commitments, and the assessment of minimum charges despite the payment of all charges for which service was rendered that in the aggregate over the performance of the agreement for its full term exceeded the minimum charges, violate the prohibition against unreasonable practices under Section 201(b) of the FCA;

(2) Minimum Monthly Usage Charges ("MMUCs") that are imposed despite the payment of all charges for which service was rendered and that in the aggregate, over the performance of the agreement for its full term, exceed the minimum charges based on fractional portions of the term, violate Section 201(b)'s prohibition against unreasonable and unjust charges; and

(3) The billing and collection of invalid charges and charges for which no service is rendered violate Section 203(c)'s provisions that no carrier may charge, demand, collect, or receive compensation for communications services except as specified in its schedule of charges (contract) or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in its schedule

of charges (contract). In addition, whether such practices also constitute separate violations of Section 201(b)'s prohibition against unreasonable practices.

For the reasons more fully set forth below, Petitioners are required to file this Petition for Expedited Declaratory Ruling to compel action by the Federal Communications Commission, as required by the Administrative Procedures Act, 5 U.S.C. §555(b). That provision requires that "within a reasonable time, each [federal] agency shall proceed to conclude a matter presented to it." More than six months ago, on September 19, 2008, Petitioners filed a Petition for Declaratory Ruling seeking resolution by the FCC of the issues identified above. Since that time, Petitioners have made numerous inquiries as to the likely date that Petition would be put out for Public Notice. Unfortunately, Petitioners have been informed by FCC Staff – in contravention of the FCC's Congressional mandate that the FCC should "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice"[1] – that the Petition was deliberately ordered to be withheld from public notice and was not to be acted on in any way. Given the failure to date of repeated efforts to have this miscarriage of justice rectified, absent refilling this Petition, Petitioners' rights will continue to be violated not only by the practices complained of, but by the Commission's own dereliction of its duties. Thus, notwithstanding the lapse of time between now and the original filing on September 19, 2008, Petitioners have no other recourse then the action it has been forced to take here.

Recent statements of Acting Chairman Copps provide Petitioners with a certain degree of hope, however, that under a new Administration, the FCC will not only bring its activities into conformity with its Congressional mandates, but that it will make every effort to avoid a repeat of the misadministration that resulted in the decision in Telecommunications Research & Action

[1] Communications Act of 1934, As Amended, 47 U.S.C. §154(j) ("Communications Act").

Center v. FCC, the seminal case on unreasonable governmental delay.[2] Acting Chairman Copps has publicly pledged that -

> "the first thing we need to do as an organization is to improve our lines of communication, enhance the level of transparency in our work, and bring to our daily decisions the kind of openness that gives true credibility to everything we do."[3]

Acting Chairman Copps rightfully places significant emphasis on the need for transparency in Commission actions:

> "[M]ost critically, there are actions that we must take now to make the FCC more transparent, open and useful to the stakeholders that we serve. And when I say stakeholders, I include not just the industries that we regulate but more importantly, all citizens – and here let me once again underline the word 'all.' Regardless of whether a person is rich or poor, lives in a rural or urban area or on tribal lands, in affluence or just struggling to get by, whether they have a disability or are senior citizens or college students, they are – each and every one of them – a stakeholder. The spectrum is theirs and the rest of us are stewards. No matter who it is, every citizen in this great land has a right to expect that we will keep them in the forefront of our attentions and concern. It's what the public interest is all about."[4]

Petitioners are examples of those harmed by the Commission's failure to operate as Acting Chairman Copps has pledged it now will under new leadship. Petitioners were indeed encouraged by the statements that the reestablishment of the policies on openness and transparency are to apply to both companies subject to FCC regulation and private members of the public alike. Petitioners see in these public statements a commitment at the highest level within the Commission of vigorous adherence to meet the duties under the Communications Act to "coordinate and organize the work of the Commission in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission."[5] Unfortunately, all though thus encouraged and counting on the change in administration to rectify the miscarriage of justice that occurred under the previous administration, Petitioners pursuit of their rights continues to be ignored and have not yet

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[2] Telecomms. Research & Action v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

[33] "Remarks of Acting Chairman Michael J. Copps to the Federal Communications Commission Staff," Washington, DC, January 26, 2009, p. 2.

[4] Id., p. 3.

[5] Communications Act, 47 U.S.C. §155(a).

the tangible results to be expected from the Acting Chairman's rededication of the Commission to proper and just administration have not become a reality.

Indeed, it was only the day after the Acting Chairman's public statements in favor of increased transparency and accountability of government to the public and the industry that FCC Staff informed Petitioners that the previous administration had directed the September 19, 2008, Petition *not* be released for Public Notice.[6] Several weeks later, with increased frustration and increasing concern that continued FCC delay would result in precipitous action by the District Court judge who had up to that point been holding a case in abeyance pending FCC resolution of the outstanding issues, Petitioners fully informed personnel within the Acting Chairman's office of the troubling aspects of this situation. Nonetheless, to date, no action has been taken on the Petitioners' September 19, 2008 Petition.

Having been deliberately deprived of their rights, but despite all, still confident that the promises of change are sincerely meant, Petitioners chose to re-present the three issues through the instant Petition. Each of these issues remains a matter of widespread industry application and each, given the Commission's continued inaction, remains unresolved. Resolution is necessary not only to limit (and perhaps reverse) the harm experience by Petitioners during the six-month period of inaction on their original Petition but also to ensure that other entities subject to the FCC's jurisdiction, and the public that such entities have the statutory duty to serve, do not experience similar unreasonable treatment at the hands of underlying service providers. Given the FCC's outright refusal to even acknowledge Petitioners' requests for guidance and assistance since the filing of the September 19, 2008 request, Petitioners respectfully submit that nothing short of an

[6] Conversation of Pamela Arluk, January 27, 2009. In that same conversation, Ms. Arluk indicated that as of that date, she had not approached the new administration with a similar request to release the September Petition on Public Notice. Since then, Ms. Arluk has reported that having made inquiry, she was still given no direction on how to handle the September 19, 2008 Petition.

expedited comment cycle and decision on the instant Petition for Expedited Declaratory Ruling will suffice to restore many of Petitioners' rights.

I. EXPEDITED CONSIDERATION OF THIS REQUEST FOR DECLARATORY RULING IS REQUIRED IN THE INTERESTS OF JUSTICE

As noted above, the FCC, as a federal agency, is required by the Administrative Procedures Act to take action when presented with issues for resolution.[7] Furthermore, the FCC cannot provide mere lip service to its obligation to act – it must actually take action. It has been settled law for more than fifty years that "'[t]he Commission cannot, by its delay, substantially nullify rights which the Act confers, though it preserves them in form.'"[8]

The appropriate action here is the issuance of a Public Notice on a Petition for Expedited Declaratory Ruling. Pursuant to FCC practice and procedure, upon the filing of a petition for declaratory ruling, the Agency issues a Public Notice calling for comment on the issues raised therein.[9] Furthermore, for very good reason, a Petition for Declaratory Ruling is always a "permit-but-disclose" proceeding:[10] In adopting the "permit-but-disclose" *ex parte* rules, the FCC held that

> "the Commission is of the view that the public interest will best be served if we are not unduly hampered in our efforts to increase our knowledge so as to better engage in policy formation and other rulemaking activities, and if interested persons are not unduly restricted in their opportunity to provide us with data, views and arguments

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[7] Wang v. Chertoff, Slip Copy, 2009 WL 790165, D. Idaho, 2009 (March 23, 2009). ("The APA further directs that 'each agency shall proceed to conclude a matter presented to it' 'within a reasonable time.' 5 U.S.C. §555(b).")

[8] *See* Cutler v. Hayes, 818 F.2d 879, C.A.D.C. 1987, (quoting "American Broadcasting Co. v. FCC, 89 U.S. App. D.C. 298, 307, 191 F.2d 492, 506 (1951)).

[9] *See* Public Notice, "Comment Sought on Request for Declaratory Ruling filed by General Communication, Inc., Regarding Application of Section 54.307(B) of the Commission's Rules, WC Docket No. 05-337, DA 09-628, WC Docket No. 05-337 (rel. March 19, 2009).

[10] Id., p. 1 ("This matter shall be treated as a 'permit-but-disclose proceeding in accordance with the Commission's *ex parte* rules."); *see also* Public Notice, "Extension of Time and Waiver of Reply and Service Rules Regarding Petitions for Declaratory Ruling Regarding Public, Educational and Governmental Programming, MB Docket No. 09-13, CSR-8126, CSR-8127, CSR-8128, DA 09-531 (rel. March 13, 2009) ("On February 6, 2009, the Bureau issued a Public Notice seeking comment on petitions for declaratory ruling . . . this proceeding will continue to be treated as 'permit-but-disclose' for purposes of the Commission's *ex parte* rules.)

> with respect to the various matters under consideration . . . a general ban on *ex parte* communications in formal rulemaking [would be] undesirable, because it would deprive agencies of necessary flexibility and would introduce an undue degree of formality into rulemaking proceedings."[11]

The Commission continued, however, making abundantly clear that this policy in favor of fostering the development of a full record is not confined to the formal rulemaking context:

> "In all other notice and comment proceedings, we propose to implement procedures which would provide for the disclosure of, and the opportunity to respond to, all significant information and arguments presented to the agency on an *ex parte* basis."[12]

Thus, Petitioners are entitled to the full and public airing of the issues presented in the instant Petition; indeed, they are also entitled to that full public airing, *and the opportunity to respond to* all information and arguments which have been presented to the agency with respect to Petitioners' original September 2008 Petition. That is the precise opposite of what has occurred, however. Just 10 days after the September 2008 Petition was filed, the opposing party – the party that stands accused of engaging in unreasonable practices as a matter of its general business culture – filed a document which can only be considered an "opposition" to the September 2008 Petition.[13] No one else was permitted to participate in this matter, nor could they have, because there had been no public notice issued at that point, and of course, there still has not been one.

Arguably, consistent with the purposes of the FCC's *ex parte* rules, this submission should have been rejected. Certainly it should not have had controlling influence over the Commission or the Staff handling the Petition. Yet, given what has transpired, the inference is inescapable that this "opposition" is the "smoking gun" that was used to corrupt the process and keep the September

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[11] In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning *Ex Parte* Communications and Presentations in Commission Proceedings, Order, Notice of Inquiry and Policy Statement, GEN Docket No. 78-167, 68 F.C.C.2d 804 (1978), ¶¶ 12-13.

[12] Id., ¶ 15.

[13] *See* Letter of Joan M. Griffin, Attorney for Global Crossing Bandwidth, Inc., September 29, 2008 ("enclosed for filing are the original and four (4) copies of the initial response of Global Crossing Bandwidth, Inc. to the Petition for Declaratory ruling that is captioned above.")

2008 Petition from public release. Indeed, in Staff's communication to Petitioners' counsel on January 27, 2009, the legal positions espoused by GX in the September 29th submission are essentially repeated back verbatim.

As an official agency of the United States government, the FCC is bound to adhere to fundamental principles of due process. The Supreme Court has held that

> "Due process, unlike some legal rules, is not a technical concept unrelated to time, place and circumstances. Due process is flexible and calls for such procedure protections as the situation demands."[14]

Furthermore,

> "[I]t is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."[15]

The existing procedures of the FCC do not contemplate consideration of an opposition to a Petition that has not, even today, been released on Public Notice. And the Agency certainly cannot countenance such a flagrant end-run around its *ex parte* rules or its procedures designed to facilitate the development of a full record in matters brought before it. To say the very least, the circumstance created by the FCC with respect to Petitioner's September 2008 Petition make a mockery of the transparency and accountability goals announced by Acting Chairman Copps.

With respect to the instant Petition for Expedited Declaratory Ruling, the only course of action that would be consistent with FCC rules and policy is the issuance without further delay of a Public Notice calling for comment on the Expedited Petition, and a timely resolution of the issues presented there. As the FCC has on numerous times been informed by the Courts, it is not permitted to place matters brought before it into an indefinite regulatory limbo. In fact, the FCC

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[14] *Matthews v Eldridge*, 424 U.S. 319 (1976).
[15] *United States v Cacares*, 440 U.S. 741, 751 (1979).

has been chastised on this point repeatedly in the past.[16] Indeed, as noted above, for 25 years the seminal case on the determination of unreasonable agency delay has been an FCC case -- Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).[17] "Courts apply the factors of *Telecommunications Research & Action Center v FCC*, 750 F.2d 70 (D.C. Cir. 1984) (TRAC), in determining whether relief under the APA should be granted."[18] Of particular relevance to Petitioners' situation are factors (5) and (6):

> "(5) the Court should also take into account the nature and extent of interests prejudiced by the delay, and (6) the Court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonable delay'."[19]

As to factor (5), it is indisputable that Petitioners have been unduly prejudiced by the FCC's refusal to process the September 2008 Petition. During the six months since the filing of Petitioners' original Petition for Declaratory Ruling, the District Court judge that had been holding an active case in abeyance in order to permit the FCC to rule on overarching issues within its

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[16] *See* MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980) (4 year delay); In re. Core Communications, Inc., 531 F.3d 849, 849-850 (D.C. Cir. 2008) ("Seven-year delay of Federal Communications Commission (FCC) in explaining legal basis for rules excluding Internet service provider (ISP) bound calls from reciprocal compensation requirements of Telecommunications Act was so egregious as to warrant mandamus under All Writs Act; agency's failure to respond to Courts specific request on remand was unreasonable. 5 U.S.C.A. §706(1); 28 U.S.C.A. §1651(a); Telecommunications Act of 1996, §101(b)(5), 47 U.S.C.A. §251(b)(5)"; It has been three years since we dismissed CORE's first petition and six years since we remanded the case to the FCC to do nothing more than state the legal justification for its rules. At this point, the FCC's delay in responding to our remand is egregious."); Nader v. FCC, 20 F.2d 182 (D.C. Cir. 1975) (finding unreasonable delay where two issues were in their tenth year of consideration and ordering the FCC to resolve the issues promptly).

[17] *See* Wang v. Chertoff, Slip Copy, 2009 WL 790165, D. Idaho, 2009, ftnt. 2, where less than two weeks ago, the Court continued to identify "Telecomm Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ('TRAC'), as the leading case on the issue of unreasonable delay. Telecomm set forth a six-factor test, commonly called the TRAC Factors, to assess the reasonableness of agency delay."

[18] Byrd v. Jossie, Slip Copy, 2009 WL 348733, D. Or. 2009 (Feb. 11, 2009) ("Under the APA, the reviewing Court 'shall' 'compel agency action unlawfully withheld or unreasonably delayed.' 5 U.S.C. §706(1); *See* Forest Guardians v. Babbitt, 174 F.3d 1178, 1191 (10th Cir. 1999) (under clear command of §706, once a court deems agency delay unreasonable, it must compel agency action.")

[19] Wang v. Chertoff, *supra*, ftnt. 2.

particular sphere of expertise may have grown frustrated by the Agency's lack of action. But whatever the reason, the Court proceeded to issue a ruling on the telecommunications-specific issues, a ruling that simply repeats the error in understanding the controlling principles of federal communications law. Petitioners are now further burdened with the necessity to deal with a ruling that misunderstands federal communications law until the issues are ripe for appeal. An expedited decision on the instant Petition could alleviate this burden and assist the court in its further deliberations.

As to factor (6), at this time, Petitioners will not pursue further documentation on the public record of the actual impropriety lurking behind the Agency's lassitude here. The facts described above speak for themselves. Indeed, such action is not necessary at this time if this re-filed Petition is now properly processed. For it is true that "[i]f the Court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable."[20] However, even in the absence of bad faith, it is still necessary to examine

> "the agency's explanation, such as administrative necessity, insufficient resources, or the complexity of the task confronting the agency . . . and if an agency's failure to proceed expeditiously will result in harm or substantial nullification of a right conferred by Congress, 'the Courts must act to make certain that what can be done is done.' The Court should weigh any explanation of administrative difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources. Of course, these justifications become less persuasive as delay progresses, and must always be balanced against the potential for harm."[21]

With respect to the September 2008 Petition, no claim of administrative necessity, insufficient resources or complexity of issue has been made. Rather, the only enunciated concern has been the concern of the FCC, as expressed by a single Staffer, that "it's more of a, really a dispute between two carriers on billing issues rather than really a broader policy question." As the remainder of this Expedited Petition makes clear, the issues in need of resolution affect an entire

[20] Cutler v. Hayes, 818 F.2d 879, 898 (D.C. Cir. 1987).
[21] Id.

industry – the telecommunications industry that is the FCC's precise sphere of expertise. Furthermore, if this were a mere carrier-to-carrier dispute, Petitioners would be much more advantageously positioned than they are today; pursuant to the FCC's Accelerated Complaint Rules,[22] a simple carrier-to-carrier dispute may be designated for the Commission's so-called "Rocket Docket" and will thereafter be resolved by the FCC within an accelerated five-month time spam. Had this option been available to Petitioners, although the industry at large would not have had the benefit of full resolution of the issues, Petitioners at least would have received their decision at the very latest *six weeks ago*. And, as noted above, Petitioners have experienced actual – not merely theoretical harm – as a result of the Agency's delay.

The TRAC Factors apply both to matters that are subject to a mandatory decision timeframe and to matters which do not have a precise decision window:

> "This conclusion is supported by cases in which courts have analyzed whether agency delay is reasonable under the APA even in the absence of a statutory timetable for agency action. For example, neither Telecomms. Research & Action v. FCC ('TRAC'), 750 F.2d 70, 80 (D.C. Cir. 1984), the case articulating the six 'TRAC' factors for determining when agency delay is unreasonable, nor any of the cases relied on in discerning the factors, involved agency inaction in the face of a mandatory deadline."[23]

And, of course,

> "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief."[24]

Accordingly, in order to maintain the integrity of the Commission's processes, to ensure the conformity of the Agency's actions with its own rules, to preserve Petitioners' procedural rights –

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[22] *See* 47 U.S.C. §1.730, et seq.

[23] Roshandel v. Chertoff, Not reported in F.Supp.2d, 2008 WL 1969646, (W.D. Wash., may 5, 2008), ftnt. 6.

[24] Cutler v. Hayes, *supra.*, ftnt. 154 (citing Environmental Defense Fund, Inc. v. Hardin, 138 U.S. App. D.C. 391, 397, 428 F.2d 1093, 1099 (1970)). *See also* ftnt. 154 ("There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable timeframe is tantamount to refusing to address issues at all – and the result is a denial of justice.")

and most importantly, to provide an end to uncertainty with respect to the industry-wide issues raised herein, Petitioners respectfully request that this Petition for Expedited Declaratory Ruling be released on Public Notice without delay and resolved expeditiously.

II. BACKGROUND

This Petition for Declaratory Ruling ("Petition") is filed to terminate existing and on-going controversies at law, remove uncertainty as to the interpretation and scope of sections 201(b) and 203(c) of the FCA directly relevant to the controversies at law, and to avoid creating inconsistent decisions between the courts and the Commission in the interpretation and application of the FCA in which the Commission is the expert agency, created by Congress, to see to the proper enforcement of the FCA's provisions.

OLS, Inc. ("OLS") is a corporation organized under the laws of the State of Georgia; TeleUno, Inc. ("TeleUno") is a corporation organized under the laws of the State of Delaware. Each Petitioner is a switchless resale common carrier certificated by the FCC and various state commissions ("PUCs") to provide telecommunications services at retail to the using public pursuant to tariffs and/or contracts.

Global Crossing Bandwidth, Inc. ("GX" or "Global Crossing") is a corporation organized under the laws of the State of California, with its principal place of business in the State of New York. GX owns, leases and operates network facilities as a common carrier certificated by the FCC and various PUCs to provide, pursuant to tariffs and/or contracts, telecommunications services at retail to the using public and at wholesale to companies like Petitioners for their resale to the using public.

Petitioners entered into certain service agreements with GX whereby GX agreed to serve as their underlying telecommunications carrier ("Agreements" or "CSAs").[25] Under the terms of the Agreements, GX agreed to, *inter alia*, submit to the Petitioners accurate monthly invoices at the charges agreed to and specified in the Agreements for the services provided, follow express procedures in resolving disputed charges and to perform the Agreements in accordance with all state and federal laws.

In rendering its services both to the using public and the Petitioners, GX is subject to the requirements of the FCA, 47 U.S.C. Title 151 *et seq.*, the rules of the FCC, 47 CFR, and the statutory enactments and implementing regulations of the PUCs. In rendering its services to Petitioners, Global Crossing is subject to the requirements of the FCC's Resale Policy. Pursuant to the FCC's Resale Policy, the relationships between each Petitioner and GX is the same carrier-customer relationship as exists between GX and any member of the using public that is a retail customer of GX. Pursuant to the carrier-customer relationship that exists between each Petitioner and GX, Petitioners are entitled to the rights and protections as a customer accorded by Title II of the FCA, and GX is subject to the obligations of a carrier in dealing with Petitioners as required by Title II.

Throughout the term of the Agreements, Global Crossing engaged in a pattern of unfair and arbitrary business practices, including without limitation, rendering inaccurate and inflated invoices, knowing them to be inaccurate and inflated, charging rates in excess of those specified in the

[25] In particular, the Agreements entered into between the Petitioners and GX provide: On or about August 21, 2000, GX and OLS entered into a Carrier Service Agreement ("OLS Agreement") under which GX agreed to sell, and OLS agreed to purchase, network transport and other telecommunications services from GX for resale to its customers. The OLS Agreement was subsequently amended on March 18, 2002, October 22, 2002, February 26, 2003 and October 27, 2003. *See* Complaint filed in *Global Crossing Bandwidth, Inc. v. OLS, Inc. and TeleUno, Inc.*, Docket No. 05CV6423(L/F), U.S. Dist. Ct. Western District of New York ("*GX v. OLS*") (hereinafter referred to as "Complaint"). On or about October 27, 2003, GX and TeleUno entered into a Carrier Service Agreement ("TeleUno Agreement") under which GX agreed to sell, and OLS agreed to purchase, network transport and other telecommunications services from GX for resale to its customers.

contract's schedule of charges, assessing Late Payment Charges ("LPCs") on charges and assessments that were not valid and not owed, and assessing MMUCs when none applied.

Whenever Petitioners disputed these items in the invoices, GX largely ignored the dispute procedure, unilaterally altered the procedures to allow it to evade its obligations, or deliberately misrepresented the requirements to complete the dispute process, then unreasonably rejected Petitioners' disputes. After rejecting the disputes, GX then inflated charges by demanding payment of amounts it knew were not valid or owed. GX was aware of Petitioners' dependency on the proper performance of the Agreements. GX was also aware that Petitioners' dependency could be used to obtain unfair advantage and to extract payments of charges and assessments that were invalid or inconsistent with the Agreements and their schedules of charges.

GX used Petitioners' dependency for service to engage in its unreasonable practices by repeatedly threatening service disconnection, engaging in a pattern of misrepresentations, arbitrarily dismissing Petitioners' disputes without rational or factual basis or consideration of the supporting documents and information Petitioners provided, billing in excess of its schedule of charges and imposing charges for which no services were rendered, no costs incurred and for which no other legal consideration existed. Because Petitioners faced serious injury and possible loss of their business if disconnected by GX, Petitioners were forced to pay rates not in GX' schedule of charges, Primary Interexchange Carrier Charges ("PICCs") for which no support was provided, PIC Change Charge and late payment charges assessed on these invalid charges.[26]

In early 2004, the pending disagreements over GX' practices had not been resolved. However, GX promised to forgive the amounts in dispute if Petitioners would execute a year's extension of the parties' Agreements. Seeking to put an end to the long-pending controversies,

[26] When faced with flash-cut disconnection by their underlying carriers, resale carriers like Petitioners can lose 50 to 100% of their customer base. Even when migrating to another underlying carrier when not under such duress, 25-50% of a customer base is put to risk. And in some cases, underlying carriers can simply take over their resale carrier's customer base.

recognizing other options were no less risky, and in reliance on the overt representations of GX that such action would resolve all open issues by removing all disputed charges from GX' invoices, Petitioners agreed to the one-year extension of its Agreement.

A year later, new disputes over GX' practices and billing had arisen but the adjustments promised on the pervious disputes had not been made by GX. Ignoring its failure to resolve the old disputes, GX offered to forgive the newly disputed amounts in return for the Petitioners agreeing to extend their Agreements for yet another year. Petitioners concluded that GX' use of bogus charges and refusal to follow the agreed to dispute procedures in order to exact contract extensions was a common practice of GX and if agreed to would result in its repetition. Facing such an untenable business position, in January 2005, Petitioners moved their customers to another underlying carrier. The process consumed approximately 60-90 days, required the expenditure of regulatory and other costs that customarily arise when switching underlying carriers, including the loss of customers.

On or about August 18, 2005, GX filed a lawsuit against the Petitioners in the United States District Court for the Western District of New York ("District Court") seeking damages in the amount of $1,361,766.61 "for the OLS Services, including the minimum usage fees and termination charges ... and damages in the amount of $600,003.11 for the TeleUno Services, including the minimum usage fees and termination charges ...."[27]

In defense of GX' suit, and in support of its compulsory counter-claims, Petitioners relied on, *inter alia*, GX' practices of misbilling, demanding, collecting and attempting to collect invalid charges contrary to its schedule of charges, its threats to disconnect service if its invalid charges were not paid, its assessment of MMUCs which provide GX with wind fall profit (i.e., 100% in revenues from these charges without any costs incurred or any services being rendered).

[27] *See Global Crossing Bandwidth, Inc. v OLS, Inc., et al.*, 05CV6423(L/F), U.S. Dist. Ct. Western District of New York ("*GX v OLS*").

A. Cross Motions For Summary Judgment

GX and Petitioners filed Cross-Motions for Summary Judgment with the District Court. A key issue before the Court was the validity of the MMUCs imposed by GX. Under the Agreements, as amended, the Petitioners' combined commitment required the purchase of $10,800,000 in services ("Usage Charges") over the terms of the Agreements. *See* Complaint, at § 3.8 and Amendments thereto. The total amount of Usage Charges actually paid by the Petitioners to GX, for usage alone was $11,983,195.24.

Petitioners' payment of Usage Charges of $11,983,195.24 exceeded their total usage commitments under the Agreements of $10,800,000. It is indisputable therefore that Petitioners exceeded their maximum usage commitments by $1,183,195.24 under the Agreements. Despite paying more in Usage Charges than committed to pay under the Agreements, the Petitioners received no additional consideration from GX, no improvement in services, no discounts or other benefits in exchange for their payments over commitment level.

In the District Court's July 9, 2008 *Decision and Order* (the *"Decision and Order"),* the court ruled the MMUCs were valid and enforceable. However, the *Decision and Order* did not appropriately address Defendants' Section 201(b) challenge to the MMUCs and did not mention Petitioners' Section 203(c) challenge to the MMUCs. In particular, the *Decision and Order* did not examine whether Defendants actually received the rate concessions bargained for in exchange for the payment of the MMUCs.

In order to determine whether such charges violate Section 201(b), the question is whether a *quid pro quo* existed for the MMUCs. Notwithstanding the issuance of the *Decision and Order,* a number of Petitioners' counterclaims, including the contention that GX' practices violate the FCA, remain undecided. No final judgment as to damages has been possible in the District Court because of the pendency of Petitioners' remaining counterclaims, which may only be resolved by FCC action

here. No resolution of Petitioners' counterclaims should have been adjudicated until the Commission, as expert agency, had declared the proper application and interpretation of sections 201(b) and 203(c) to the facts and practices set forth herein.

In September 2008 Petitioners informed the FCC in their initial Petition for Declaratory Ruling, as yet not acted upon by the Commission, that they had moved the District Court to Stay the *GX u OLS* case in order to permit the Commission to first determine the issues of the reasonable of the practices and charges as set forth therein (and as repeated in this Petition for Expedited Declaratory Ruling. While the District Court was amenable to awaiting FCC action (at least for a reasonable period of time), the Court's patience has grown thin and –if Petitioners are to have any opportunity to protect their contractual rights and fully prosecute their counterclaims, an FCC decision on the industry-wide issues set forth below is imperative.

In light of the Petitioners' surviving counterclaims and the District Court's *Decision and Order,* Petitioners hereby seek declaratory rulings – that

> (1) An underlying carrier's practices, including demands for payments of disputed amounts unilaterally rejected without basis and in violation of expressly agreed to dispute procedures, repeated use of threats to disconnect its services unless invalid charges are paid, promising forgiveness of the invalid charges for agreement to enter into additional term commitments, and the assessment of minimum charges despite the payment of all charges for which service was rendered that in the aggregate over the performance of the agreement for its full term exceeded the minimum charges, violate the prohibition against unreasonable practices charges under Section 201(b) of the Federal Communications Act ("FCA");
>
> (2) Minimum Monthly Usage Charges ("MMUCs") that are imposed despite the payment of all charges for which service was rendered and that in the aggregate, over the performance of the agreement for its full term, exceed the minimum charges based on fractional portions of the term, violate Section 201(b)'s prohibition against unreasonable and unjust charges; and
>
> (3) The billing and collection of invalid charges and charges for which no service is rendered violate Section 203(c)'s provisions that no carrier may charge, demand, collect, or receive compensation for communications services except as specified in its schedule of charges (contract) or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in its schedule of charges (contract). In addition, whether such practices also constitute separate violations of Section 201(b)'s prohibition against unreasonable practices.

III. THIS PETITION FOR DECLARATORY RULING IS PROPER AND A COMMISSION RULING WILL HELP RESOLVE A RIPE CONTROVERSY

A Commission ruling on this Petition is essential to the resolution of the application of sections 201(b)[28] and 203(c)[29] to the practices of underlying carriers in their dealings with their resale carrier customers as evidenced by GX' practices described herein, which rulings may then be applied to GX' specific practices as applied to Petitioners. Under sections 4(i) and 4(j) of the FCA, sections 1.1 and 1.2 of the Commission's Rules, and 5 USC section 554(e), the Commission has wide authority to issue declaratory rulings to serve the public interest by resolving a controversy and eliminating uncertainty.[30] The Commission's discretion to issue declaratory rulings can particularly serve these purposes when parties are in the midst of an ongoing dispute in another forum that can be moved ahead by a clarification of Commission rules, regulations or orders that have become the subject of a controversy.

In the *Hold Order*, Home Owners Long Distance ("HOLD") was involved in an ongoing court proceeding with WorldCom, Inc. ("WorldCom") concerning, among other things, liability limitations contained in WorldCom's tariff. HOLD filed a Petition for Declaratory Ruling with the Commission and at about the same time filed a motion to stay or abate the ongoing court proceeding until the Commission had an opportunity to resolve the questions concerning the

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[28] 47 U.S.C. § 201(b) states: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful..." (emphasis added).

[29] 47 U.S.C. § 203(c) states, in part: "... no carrier shall charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service ... than the charges specified in the schedule [contract] then in effect ... or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule [contract], ..."

[30] *See* In the Matter of Petition of Home Owners Long Distance, Inc. for a Declaratory Ruling that WorldCom Cannot Limit Its Liability for Gross Negligence or Other Willful Misconduct Through its Interstate Tariffs, Order, 14 FCC Rcd 17,139 (1999) ("*HOLD Order*") at ¶ 12 ("The Commission has broad discretion under the Administrative Procedure Act and Commission rules to determine whether deciding a petition for declaratory ruling on the merits is necessary to 'terminate a controversy or remove uncertainty.'").

lawfulness of tariff provisions raised by the petition. The court granted the stay and referred the issue of the lawfulness of liability limitations in WorldCom's tariff to the Commission under the doctrine of primary jurisdiction.[31] The Commission issued a Public Notice seeking comment on HOLD's petition, and specifically, among other issues, whether the tariff provision in question "constituted an unjust and unreasonable practice under section 201(b) of the Act."[32]

In deciding whether to exercise its discretion to rule on HOLD's petition, the Commission set forth two relevant questions: "whether reaching the merits of HOLD's petition is necessary to assist the Court in resolving the referred issue; and if not, whether reaching the merits of HOLD's petition nevertheless is appropriate to terminate a controversy or remove uncertainty."[33] A Commission decision on the questions presented by Petitioners herein will assist in resolving the controversy between the parties as to whether unreasonable practices in violation of section 201(b) have occurred and whether, as part of those practices, violations of section 203(c) have occurred that also constitute violations of section 201(b). A ruling in Petitioners' favor will direct the proper application of Commission precedent and Communications laws to the facts developed and will further assist in the determination of damages. Furthermore, as a more general matter, a Commission ruling on this Petition will clarify the duties and responsibilities of wholesalers and resellers regarding their dealings and will help carriers avoid similar disputes in the future.

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[31] Id. at ¶ 6.

[32] Id. at ¶ 7. In the *HOLD* case, before the Commission ruled on the petition, WorldCom filed a "proposed settlement for dismissal" of HOLD's petition for declaratory ruling stating that WorldCom would not rely on the liability limitations in its tariff as a defense in that or future proceedings, *id.* at ¶ 10, and WorldCom amended the tariff provision in question. Because WorldCom's proposed settlement "provide[d] HOLD with virtually all of the relief it sought in its petition" (*id.* at ¶ 18) and to the extent that the issue referred by the court was no longer "live," (*id.* at ¶ 13), the Commission did not reach the merits of HOLD's petition.

[33] Id. at ¶ 12.

This Petition is timely and procedurally appropriate given the circumstances described above. Wherefore, the Commission should exercise its discretion and, as requested, issue a ruling on this Petition.

IV. ARGUMENT

A. GX' Course Of Conduct And Imposition Of The MMUCs Violate Section 201(b)'s Prohibition Against Unreasonable And Unjust Charges

A ruling by the Commission on the Petitioners' Section 201(b) challenges to GX' practices and its imposition of MMUCs is warranted and appropriate. GX and Petitioners, as regulated carriers in a wholesale/resale relationship, bring to their business relationship certain regulatory responsibilities that cannot be contracted away or unilaterally ignored. One such responsibility is for GX to provide service in a just and reasonable manner. When a carrier, such as GX, provides its services in an unreasonable manner, customers like Petitioners have the absolute right, as a matter of law, to pursue their Communications law claims.[34]

Through its counterclaims and defenses in *GX v OLS,* Petitioners have raised the issue of GX' unreasonable practices and presented facts evidencing conduct that constitutes violations of the FCA. A determination as to whether or not GX' practices violate the FCA is best left to the FCC to determine. "[T]he 'reasonableness' determination required by §201(b) is inherently a discretionary question within the agency's purview."[35] As noted above, however, the Agency's discretion does not

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[34] The Commission and the courts have consistently applied § 201(b) to one carrier's provision of a communication service to another carrier. *See id,* 59 F.3d at 1414 (Section 201(b) makes unlawful carrier's violation of agency regulation setting maximum rate-of-return for interstate access); Ascom Communications, Inc. v. Sprint Communications Co., Order, 115 F.C.C. Rcd. 3223, 2000 WL 135252 (2000) (Section 201(b) makes unlawful carrier's attempt to collect from PSP for unauthorized and fraudulent calls placed from PSP's phones over carrier's network). This makes application of Section 201(b) to the present situation straightforward. Both GX and Petitioners provide a "communication service" under the FCA and the Commission is charged with prescribing rules and regulations interpreting what is just and reasonable. *See* 47 U.S.C. § 201(b); *AT& T Corp. v Iowa Utilities Bd,* 525 U.S. 266, 278-79, 397 (1999).

[35] *Niehaus v AT& T Corp.*, 218 F. Supp.2d 531, 537 (S.D. N.Y. 2002); *In re Long Distance Telecomm Litig. - ITT U.S. Transmissions Sys., Inc.*, 831 F.2d 627, 631 (6th Cir. 1987) quoting *Cons. Rail Corp. v*

extend to the point where it may refuse to act upon Petitioners' request here.[36]

1. A ruling on the petition is necessary to avoid inconsistent rulings.

The Commission's ruling on this Petition is necessary to stave off inconsistent rulings. The District Court's *Decision and Order* erroneously concluded that the FCC's decision in *Ryder* is dispositive as to the reasonableness of *all* minimum usage/termination fees.[37] However, in *Ryder*, the FCC based its decision on the particular facts presented in that case, and the FCC's holding in that case cannot be read as a wholesale endorsement of every minimum usage scheme concocted by wholesale carriers. Rather, the FCC determines the reasonableness of such fees on a case-by-case basis. This much is evidenced by the FCC's plain language in *Ryder* – "CT 6831's early service termination provision, *read in context*, comports with the reasonableness requirement of section 201(b)."[38]

Expanding the scope of *Ryder* beyond that which was contemplated by the FCC increases the risk of inconsistent rulings. Thus, a determination as to the extent to which *Ryder* is applicable to the present case is best made by the FCC. The danger of inconsistent rulings is augmented by the District Court's inability to conduct a comprehensive analysis of the technical and factual issues at play in this case. Importantly, in *Ryder*, the FCC conducted an extensive inquiry into the bargaining relationship of the parties.[39] A crucial component of the FCC's 201(b) reasonableness analysis was the existence of valid *quid pro quo*. While the FCC acknowledged that it has approved the inclusion

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Nat'l Ass'n of Recycling Indus., Inc., 449 U.S. 609, 612 (1981) ("Section 201(b) speaks in terms of reasonableness . . . This is a determination that 'Congress has places squarely in the hands of the [FCC].'").

[36] *See* Section I, infra.

[37] In re Ryder Communications, Inc. v. AT&T Corp., Memorandum Opinion and Order, 18 F.C.C.R. 13603 (2003).

[38] Id. at 13619 (emphasis added).

[39] Id. at 13614-615.

of early termination clauses in other contracts, it specified that such allowances were dependent on the existence of valid *quid pro quo* in each case.[40]

Determining the extent to which *Ryder* is factually distinct from the present case and determining whether GX' course of conduct was unreasonable involve "issues of fact not within the conventional experience of judges."[41]

2. GX provided no *quid pro quo*.

The Agreements at issue provided for the imposition of MMUCs in exchange for GX' promise that it would provide certain rate concessions and rate credits to Petitioners. In other words, the *quid pro quo* consisted of two elements: (1) rate-reductions in GX' long-term plans; and (2) two one-time credits of $25,000.00, provided certain benchmarks were met by Petitioners. In the context of GX' long-term plans, Petitioners repeatedly questioned the existence of valid *quid pro quo*. In response, GX was unable to produce a single shred of evidence that the rates it specified in the Agreements were discounted or otherwise different from those that it would have offered in the absence of the MMUCs.

Yet, the *Decision and Order* did not consider whether the rates offered by Plaintiff were actually reduced rates. This is a crucial issue that must be addressed by the FCC because if the rates in the Agreements do not reflect a discounted rate schedule, valid *quid pro quo* cannot exist. Thus, the MMUCs would result in windfall profits to GX and as such be an unreasonable and/or charge pursuant to Section 201(b). In addition, the *Decision and Order* also neglected to give adequate consideration as to whether the inclusion of the $25,000.00 credits in the Agreements represented valid *quid pro quo*. Petitioners maintain that the methodology by which GX determined Petitioners' eligibility for the $25,000.00 credits is an unreasonable practice.

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[40] Id. at 13617.
[41] Far East Conference v. U.S., 342 U.S. 570, 574 (1952).

In particular, GX' interpretation and application of Section 3.9 of the Agreements eliminated any realistic possibility that Petitioners could be awarded the $25,000.00 credits because, in order to be eligible for the first $25,000.00 credit, Petitioners would have had to meet the threshold of $150,000.00 in usage charges for each of the first four billing cycles, including the initial testing period. The inclusion of the test period in the credit eligibility period is facially unreasonable, as evidenced by the fact that Petitioners generated $182,719.53 in usage fees in the first cycle following the test period.

Despite this, the *Decision and Order* did not address or explain how the inclusion of credits that are in reality impossible to earn, can be considered a reasonable practice or charge. Additionally, because these credits were included in the Agreements in exchange of the MMUCs, the absence of any realistic opportunity to earn the credits further negates the existence of valid *quid pro quo*. Moreover, there was no consideration underlying GX' claims for MMUCs. The Petitioners used up and paid for usage in excess of the combined minimum commitments under the Agreements and therefore exceeded the minimum monthly usage commitments in the Agreements. Petitioners received no additional "right, interest, profit or benefit" from GX for having exceeded its minimum commitments. GX did not give or forebear anything, suffered no detriment or loss nor undertook any additional responsibility as a result of the Petitioners having exceeded their commitments. The total lack of consideration for the MMUCs is further proof that the MMUCs are an unreasonable practice and charge that violate Section 201(b) of the Act. Finally, to the extent that the FCC has not addressed the reasonableness of practices similar to those employed by GX, *i.e.* coercing contract extensions, impractical payment demands and threatening disconnection, consideration of these issues by the FCC will promote uniformity and provide guidance for other telecommunications providers.[42]

[42] Kiefer v. Paging Network, Inc., 50 F.Supp. 2d 681, 685-686 (E.D. Mich. 1999).

The FCC is best equipped to perform such inquiries, and these issues should be ruled on in this Petition in order to best promote uniformity with past and future rulings.

3. MMUCs are a windfall reflecting no actual economic loss and collection efforts violate the Communications Act.

Under the totality of the circumstances, GX' demand for $1,320,657.12 in MMUCs is, in and of itself, an unreasonable practice and charge. GX' MMUCs do not relate to any economic loss sustained by GX.[43] GX has not provided and cannot provide any value for the $1,320,657.12 in MMUCs it seeks to recover. GX' MMUCs do not reflect a relevant economic loss, nor can GX' failure to collect them be shown to be the proximate cause of any economic loss. On the contrary, GX would gain over $1.3 million for doing nothing, *i.e.* for NOT providing service.

In Multi Communications Media, the Southern District of New York noted that:

> AT&T's breach of contract damages would presumably consist of AT&T's expectation damages, *i.e.*, the profits that would have been realized from the contract had it not been terminated before its expiration. *See Bausch & Lomb, Inc. v Bressler*, 977 F.2d 720, 728-29 (2d Cir. 1992). These damages could probably be determined relatively easily. In addition, ***the minimum monthly commitment is probably not a reasonable estimate of lost profits, because the commitment does not take into account the cost of the service which AT&T need no longer provide. Therefore, there is a possibility that this clause would be construed as an invalid penalty clause.***[44]

GX' provisions, however, impose a penalty even more harsh than AT&T's minimum

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[43] The United States Supreme Court has recently reaffirmed the common law principle that one may not bring a cause of action, much less hopes to recover, if no damages have been sustained or no economic loss incurred. As GX has not and cannot sustain any loss from not collecting its MMUCs, the Petitioners refusal to pay these charges cannot be the proximate cause of such a loss. *See* Dura Pharmaceuticals, Inc. v. Broudo, 125 S.Ct. 1627, 1632, 1634 (2005). GX's allegation that the Petitioners are liable for "termination charges" fares no better. GX's illusive "termination fees" are neither identified nor quantified in the Complaint. GX never identifies the economic loss it alleges it will suffer by not recovering its "termination charges" or how the Petitioners not paying the unidentified charges could be the proximate cause of a non-existent loss.

[44] Multi Communication Media, Inc. v. AT&T, 1997 WL 188938 (S.D.N.Y. 1997) (emphasis added).

monthly commitment requirements; here, there is no possibility that their recovery by GX would compensate for lost profits because GX has lost no profits and because such minimum commitment charges do not take into account the cost of service GX no longer needed to provide.

Indeed, the one-sided nature of the MMUC provision is all the more objectionable – and unreasonable -- because it allows GX to alleviate itself from performance of its obligations to render usable service, but by imposing the MMUCs, nevertheless recover its charges in full or, in this case, recover them a second time.

4. GX used the MMUCs to extort contract extensions.

GX actually used its MMUCs to accomplish another improper purpose. From the beginning of the parties' business relationship the Petitioners disputed the invoicing of the MMUCs and in turn sought credits for such amounts. Rather than dealing with the substance of these disputes, GX offered to "forgive" the MMUCs in exchange for a year's extension of the parties' Agreements.

For the purpose of eliminating a vexatious problem for which the efforts of the Petitioners could obtain no satisfaction, the Petitioners agreed to the extension of the Agreements believing and relying on the fact that, in return, they would finally resolve the disputes over the MMUCs. In fact, with the execution of the contract extensions, GX led the Petitioners to believe that it would not, henceforth, invoice Petitioners for any MMUCs. Petitioners relied on these representations from GX and executed the extensions, believing that GX had dropped its resistence to the Petitioners' disputes over the MMUCs because of the extensions.[45] With the institution of its lawsuit against Petitioners in *GX v OLS*, however, GX again demanded that the MMUCs be paid by Petitioners.

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[45] The fact is GX never invoiced the MMUCs the month following a shortfall. Instead, GX waited until the relationship was ended and then claimed Petitioners owed all the MMUCs in the aggregate. GX' own course of dealings therefore indicated that it did not consider the MMUCs payable on a monthly basis or it would have invoiced them when the shortfall occurred. Because it didn't, GX indicated it was perfectly satisfied with being paid in full over the life of the contract, i.e., Petitioners more than made up the shortfall in following months by using more than the $150,000 in these

In short, GX used the MMUCs selectively and to its advantage to exact concessions from the Petitioners, the very definition of an unreasonable practice. In such circumstances, the coercive nature and intentional anticompetitive use of the MMUCs proves that the fixed nature of the amount of recovery represented by the MMUCs is clearly violative of the Communications Act as an unreasonable practice.

B. Gx' Billing And Collection Of Invalid Charges And Charges For Which No Service Is Rendered Violate Section 203(c) Of The Act

The MMUCs are invalid because charges imposed for which no telecommunications services are rendered violate Sections 201(b) and 203(c) of the FCA.

It is beyond dispute that unreasonable acts and practices of and unreasonable charges by carriers are violations of Section 201(b) of the FCA.[46] Attempting to bill and collect invalid charges in connection with communications services are each violations of Section 203(c) of the FCA.[47] The MMUCs, as imposed here, without any consideration or *quid pro quo*, constitute an unreasonable act and practice and unreasonable charges in violation of Section 201(b) of the FCA. Moreover, the MMUCs are invalid because charges imposed for which no telecommunications services are

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months and over the full term of the Agreement. This also shows that GX knew full well that the contract was for a term of years and not a month-to-month contract. A conclusion demanded by parties' practices and the Agreements.

[46] " ... any ... charge, practice, classification, or regulation that is unjust or unreasonable is ... unlawful. 47 U.S.C. 201(b).

[47] "no carrier shall ... charge, demand, collect, or receive a greater or less or different compensation, for ... communication(s), or for any service in connection therewith... than the charges specified in [any] schedule then in effect..." 47 U.S.C. 203(c). The FCC did away with the requirement that carriers file paper tariffs with it in July 2001. *See, MCI Worldcom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000). However, carriers remain bound by the substantive requirements of the statutory scheme found in Sections 201 through 203 of the Communications Act. That is, these section continue to govern carriers when providing communications services. Detariffing did not alleviate carriers from their duties not to engage in unreasonable acts or practices (§201), in undue discrimination (§202); nor to charge rates different from those agreed to for the services provided or to charge when no services are provided (§203). And GX expressly agreed to be bound by the laws and regulations governing communications carriers.

rendered violate Section 203(c) of the FCA. By determining these issues, the FCC will be given the opportunity to establish the proper reach of Section 203(c)'s prohibition on making attempts to bill and collect invalid bills, including attempts by filing suit for recovery.

Congress recognized that carriers regulated by the FCA would have the power and resources to bring suits against their customers regardless of the actual merits of their claims. Thus, carriers could coerce customers into paying invalid bills as a lesser burden to being sued or even threatened with suit. To prevent this abuse of size and power, Congress outlawed the practice of attempting to bill and collect charges not properly included in their schedule of charges and not agreed to by customers because such charges were not properly included or applied as intended. By considering the issue of the Plaintiff's violation of Section 203(c), the FCC will have the opportunity to notify carriers, like Plaintiff, that bringing suits for invalid charges may have the unexpected consequence of being found to be in violation of Section 203(c) and Section 201(b) as an unreasonable practice.

Such a decision may have the beneficial effect of lessening coercive lawsuits being brought in federal courts by carriers and of achieving Congress' goal of preventing carriers from using their superior resources to coerce unjustified settlements by bringing or threatening to bring suits regardless of the validity of their charges.

V. CONCLUSION

For the foregoing reasons, OLS, Inc. and TeleUno, Inc. request the Commission issue declaratory rulings as follows:

> (1) An underlying carrier's practices, including demands for payments of disputed amounts unilaterally rejected without basis and in violation of expressly agreed to dispute procedures, repeated use of threats to disconnect its services unless invalid charges are paid, promising forgiveness of the invalid charges for agreement to enter into additional term commitments, and the assessment of minimum charges despite the payment of all charges for which service was rendered that in the aggregate over the performance of the agreement for its full term exceeded the minimum charges, violate the prohibition against unreasonable practices charges under Section 201(b) of the Federal Communications Act ("FCA");

(2) Minimum Monthly Usage Charges ("MMUCs") that are imposed despite the payment of all charges for which service was rendered and that in the aggregate, over the performance of the agreement for its full term, exceed the minimum charges based on fractional portions of the term violate Section 201(b)'s prohibition against unreasonable and unjust charges; and

(3) The billing and collection of invalid charges and charges for which no service is rendered violate Section 203(c)'s provisions that no carrier may charge, demand, collect, or receive compensation for communications services except as specified in its schedule of charges (contract) or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in its schedule of charges (contract). In addition, whether such practices also constitute separate violations of Section 201(b)'s prohibition against unreasonable practices.

And, as also set forth above, in the interests of justice, OLS, Inc. and TeleUno, Inc. further request the Commission issue the above declaratory rulings on an expedited basis.

Respectfully submitted,

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April 9, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
Petition for Expedited Declaratory Ruling Regarding Application of Sections 201(b) And 203(c) To Underlying Carrier's Practices and Charges	)

VERIFICATION

State of Florida)
)
County of Broward)

I, Avelino Iglesia, being duly sworn according to law, depose and say that I am President of TeleUno, Inc. ("TeleUno); that I am authorized to and do make this Verification for it; that the facts set forth in the foregoing Petition for Expedited Declaratory Ruling ("Petition") are true and correct to the best of my knowledge, information and belief. I further depose and say that the authority to submit the Petition has been properly granted.

Avelino Iglesia

Subscribed and sworn before me this 6th day of April, 2009.

Notary Public

MICHELE C. JONES
Notary Public
Dawson County
State of Georgia
My Commission Expires Sep 12, 2011

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
Petition for Expedited Declaratory Ruling Regarding Application of Sections 201(b) And 203(c) To Underlying Carrier's Practices and Charges	)

VERIFICATION

State of Georgia)
)
County of Fulton)

I, Geri Eubanks, being duly sworn according to law, depose and say that I am Vice President of OLS, Inc. ("OLS); that I am authorized to and do make this Verification for it; that the facts set forth in the foregoing Petition for Expedited Declaratory Ruling ("Petition") are true and correct to the best of my knowledge, information and belief. I further depose and say that the authority to submit the Petition has been properly granted.

Geri Eubanks

Subscribed and sworn before me this 6th day of April, 2009.

Notary Public

MICHELE C. JONES
Notary Public
Dawson County
State of Georgia
My Commission Expires Sep 12, 2011

CERTIFICATE OF SERVICE

I, Sherry A. Reese, hereby certify that true and correct copies of the foregoing Petition for Expedited Declaratory Ruling, were served upon the following, in the manner indicated, this 9th day of April, 2009.

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o NATEK
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002
(via Hand Delivery)

Acting Chairman Michael J. Copps
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